KTL SDN BHD

v.

AZRAHI HOTELS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING-UP NO: D1-28-939-2001]
20 MARCH 2003

COMPANY LAW: *Winding-up - Request for time for settlement of debt - Whether indicative of insolvency - "Unless order" - Company to be wound up unless debt settled within stipulated time - Non-compliance - Whether winding-up justified - Stay order, application for - Principles - Companies Act 1965, ss. 218, 243, 253 - Companies (Winding-up) Rules 1972, r. 30*

The petitioner had petitioned to wind-up the respondent under s. 218 of the Companies Act 1965 ('the Act') for debt owed and outstanding. At the hearing the respondent did not resist the petition but applied instead for time to settle the debt, which the court granted. The respondent failed to pay the debt by the adjourned date, whereupon a consent order was made that "unless the matter is settled on or before 15 April 2002, a companies winding-up order shall be made against the respondent on that date" ('the unless order'). The respondent still failed to settle the debt by the extended date, and the court hence allowed the petition to wind-up the respondent. Thereupon, the respondent applied to the Court of Appeal for leave to appeal against the decision granting the winding-up order, and pending that applied to the learned judge for a stay of the winding-up order pursuant to s. 253 of the Act.

Held:

[1] There was no real or *bona fide* dispute that the debt was due to the petitioner and that the respondent was unable to pay its debt within the meaning of s. 218 of the Act. Indeed, the fact that the respondent needed time to sell its core assets in order to settle the debt showed that the respondent was insolvent. In the circumstances, the petitioner is entitled to a winding-up order *ex debito justitiae.* (p 52 b-d)

[2] In the interest of justice, a defendant's or respondent's request for an adjournment of the hearing to another date to settle the matter amicably ought to be allowed, but allowed on terms such that the court's time is

not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time to settle. This is how the concept of "unless order" took root in jurisprudence. (p 53 d-e)

[2a] The "unless order" here is tantamount to an agreement that in consideration of the time given to the respondent to pay, the respondent will not contest the petition. In any event, the "unless order" which was made with the consent of the respondent has the effect of superseding the affidavit in opposition filed under r. 30 of the Companies (Winding-up) Rules 1972. That being so, pursuant to the "unless order", the court must allow the petitioner's application to wind up the respondent. (p 55 a-c)

[3] A company which has been ordered to be wound-up has the right to appeal, including to apply for a stay of the winding-up order. But, a stay under s. 253 of the Act pending appeal should be granted only in very exceptional circumstances, for instance where the winding-up order made is patently wrong or was made in circumstances which clearly occasioned a substantial miscarriage of justice. The respondent in the instant case did not even attempt to show such exceptional circumstances. Stay therefore ought to be refused, more so when the liquidator had already gone full steam to manage the respondent's affairs. (pp 56 g-h & 57 e)

[Winding-up order granted; stay of order refused.]

Case(s) referred to:

Corporate Affairs Commission (NSW) v. Austral Oil Estates Ltd (No 2) [1989] 10 ACLR 354 ***(refd)***

In re European Banking Company, ex p Baylis [1866] LR 2 Eq 521 ***(refd)***

IOC Australia Pty Ltd v. Mobil Oil Australia Ltd [1975] 49 ALJR 176 ***(refd)***

Re A & BC Chewing Gum Ltd Topps Chewing Gum Inc v. Coakley & Ors [1975] 1 All ER 1017 ***(refd)***

Re Building Society Trust Ltd [1890] 44 Ch D 140 ***(refd)***

Re Mittagong RSL Club Ltd and the Companies Act [198] 4 ACLR 897 ***(refd)***

Re Norton Iron Company [1877] 47 LJ Ch 9 ***(refd)***

Re Roma Industries Pty Ltd [1976] 1 ACLR 296 ***(refd)***

The Orleans Marketing Company Pty Ltd v. Neydharting Moor (Australia) Pty Ltd; Neydharting Moor (Australia) Pty Ltd v. The Orleans Marketing Company Pty Ltd [1985] 3 ACLC 147 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 243, 253

Companies (Winding up) Rules 1972, rr. 30, 32

For the petitioner - SS Tieh; M/s Paul Ong & Assoc
For the respondent - R Ledchumiah; M/s Ramamoorthy Ledchumiah & Co
For the supporting creditor - Alex Chang; M/s Alex Chang & Co
For the second supporting creditor - BC Tee; M/s Sa'adiah, Khoo, Lo & Co

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

The petitioner by his petition presented on 2 October 2001, sought an order to wind up the respondent for a debt amounting to RM101,987.54. A statutory notice of demand dated 28 August 2001 had been duly served upon the respondent and had not been complied with.

In the light of the superseding developments, it is unnecessary to go into the facts of this case in detail. Suffice to say, the respondent opposed the petition and had by the first hearing on 21 January 2002 filed their affidavit in reply. The Registrar's Certificate had been issued on 11 January 2002, certifying that the petitioner had complied with the requirements of r. 32 Companies (Winding Up) Rules 1972.

The superseding developments referred to above, started as early as 31 January 2002, wherein Encik Azman bin Dawood, the project manager for the respondent who was present, requested for an adjournment for the purpose to effect a settlement and also because counsel for the respondent, Mr. Puspanathan was involved in a car accident. This was confirmed by Mr. S.S. Tieh, who appeared for the petitioner, that there was a possibility of a settlement. Accordingly, with the consent of parties present, the court adjourned the matter to 26 February 2002.

On 26 February 2002, Mr. Puspanathan, the respondent's solicitor, enlarged upon the efforts towards settlement, informing the court of the prospective sale of the respondent's single realty, the Seremban Hilton Hotel. He anticipated the execution of the sale and purchase agreement by the end of March and therefore asked for date in early April 2002.

Mr. Alex Chang, who appeared for the second supporting creditor, suggested that the Respondent be given an opportunity to resolve the matter, failing which the winding up order be made. In all fairness, he suggested a later dated, sometime in mid April 2002. His suggestion was enthusiastically received by Mr. Puspanathan.

I had of course, by this time, had the benefit of reading not only the cause papers but also the lengthy submissions prepared by parties for and against the winding up of the respondent. I was minded to grant the winding up order, as I was entirely satisfied that the respondent's case was without merit on law or fact. Clearly, there was no real or *bona fide* dispute that the debt was due to the petitioner and that the respondent was unable to pay its debts – within the meaning of s. 218 of the Act. Indeed, the essential focus of its case is that it needs time to sell its hotel to enable it to pay the respondent. This request for time to sell the very core of its assets *ipso facto* shows that the respondent was insolvent; and no attempt was made to persuade this court otherwise, as to its solvency. In any event, my view is that, actual solvency of a respondent company in a winding-up application is only relevant to establish the presence of a real dispute as to the debt, since the company is deemed to be insolvent upon failure to pay a sufficiently established debt in accordance with the s. 218 notice. In the above circumstances, the petitioner is entitled to a winding-up order *ex debito justitiae* (see *I.O.C. Australia Pty Ltd v. Mobil Oil Australia Ltd* [1975] 49 ALJR 176) though even then the court's discretion, in appropriate cases, to grant grace to settle should be untrammelled. Also, in *The Orleans Marketing Company Pty. Limited v. Neydharting Moor (Australia) Pty. Limited. Neydharting Moor (Australia) Pty. Limited v. The Orleans Marketing Company Pty. Limited* [1985] 3 ACLC 147 Helsham CJ had this to say, at p. 153:

> The submissions made to Master on 1 November 1984 and to me on behalf of the plaintiff were to the effect that having found, as he did, that there was no dispute on substantial grounds as to the plaintiff's claim the Master was bound to make a winding-up order. There being no such dispute, and the plaintiff being unable to have its debt paid, it was entitled *ex debito justitiae* to have a winding up order made. Where in the absence of any real dispute as to the debt, the failure by a company to pay in accordance with a valid s. 364 notice results in there being a deemed insolvency of the company, then the question of its actual solvency is not relevant. The general rule is that the company will be wound up, and there is no reason why a creditor whose debt is not in dispute should be sent off to sue for it in another court. There is no reason why the general rule should not be applied in this case. So run the submissions. The submissions are valid. … But the undisputed evidence was that the defendant was solvent, … there was a genuine dispute about the claim, …

Notwithstanding the aforesaid, yet bearing in mind what I thought was the imminent resolution of the matter, I agreed to stand the petition over till 15 April 2002 and recorded an order which was extracted by the petitioner in the following terms:

> **IT IS HEREBY ORDERED** by consent that unless the above matter is settled on or before April 15, 2002 between your Petitioner, the supporting creditors and the Respondent, a companies winding up order shall be made against the Respondent on that date. (emphasis added)

The 'unless order' is not a new creature. Australian cases where such orders are made are legion. The rationale underpinning this approach is both compelling and highly persuasive. Modern day courts, in this new era of rapid development, are lumbered with an ever increasing backlog of cases. Encompassed within this truism are cases where the clearly manifest intention of a defendant or respondent in a proceeding is to secure time to settle rather than to contest the matter, though he may also have filed rebuttal papers as a matter of formality. A court is naturally impelled to obviate unnecessary expenditure of its time entailed in managing and adjudicating upon a matter bereft of a serious intention on the part of the defendant or respondent to join battle. Obviously, in such situations, if the intention is to do battle, armed with cogent or even arguable grounds, the predominant focus would not be to request for time to settle the amount claimed – as in the current case where, indeed, the respondent was given more time than it requested. Thus, in the interests of justice and good grace a defendant's or respondent's request for an adjournment of the hearing to another date to settle the matter amicably ought to be allowed; but allowed on terms such that the court's time is not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time – nay, such time as requested – to settle. This is how the concept of 'unless orders' took root in jurisprudence. To illustrate this concept I need do no more than quote the illuminating *dicta* of learned judges in cases as follows. In *Re Mittagong RSL Club Ltd and the Companies Act* [1980] 4 ACLR 897, Master Cohen QC expressed the following views:

> I am of the view that the company may well have believed that for some vague and unsubstantiated reason it was entitled not to pay the moneys due to the petitioner. I do not consider that that right has in fact been substantiated but I consider that in the circumstances I should exercise the discretion given to the court and not order that the company be wound up until it has had a further opportunity to pay the debt due to the petitioner. Accordingly it is my intention to adjourn this petition for a period of 14 days. If on the adjourned date the debt has not been paid then I consider that I would be justified in order that the company be wound up, this failure being a matter which the court could take into consideration on the question of whether the company is able to pay its debts.

and decided thus:

> Petition is stood over to 26 March 1980.
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> Accordingly, I consider that the standing over of the making of any order be subject to the condition that within 14 days from today the company pay into court the sum of $10,194.06. If on the adjourned day that money has been paid as directed the petition will be dismissed. If it be not paid then I shall make an order that the company be wound up.

Also, in *Corporate Affairs Commission (NSW) v. Austral Oil Estates Ltd (No. 2)* [1989] 10 ACLR 354 Young J decided, at p. 358:

> … I commenced hearing it on Monday and yesterday, having tentatively reached the conclusion that the company should be wound up unless a scheme of arrangement could be proposed, on the application of the company I stood over the summons to 27 March to give time for a scheme of arrangement to be formulated.

In another Australian case, *Re Roma Industries Pty Ltd* [1976] 1 ACLR 296 Supreme Court of New South Wales, Bowen CJ made the following proposal:

> ... I am disposed, without making a winding up order at this time, to stand the matter over for fourteen days to enable the parties to consider the possibility of arriving at some interim arrangement. ... When the matter is listed before me again after the expiry of 14 days if the parties have not reached agreement I would propose to make a winding up order, and also an order for payment of the Commissioner's costs out of the assets of the company.

When the matter was listed again before me on 15 April 2002, Mr. Letchumiah, who appeared for the respondent, asked for a further two months to complete the sale of the hotel. He, however, conceded that it was at the respondent's specific request that the matter was adjourned to April 2002 and that the respondent had consented to the 'unless order' that was made on 26 February 2002.

Mr. S.S. Tieh, for the petitioner, was quick to point out that the court had actually granted the respondent more than the time they had requested for to resolve the matter and it was for precisely this reason that the respondent had consented to the 'unless order'. He urged the court to make the winding up order as provided for in the 'unless order'.

An 'unless order' is akin to other orders made nisi. Nisi is a Norman-French word which means 'unless'. It stands to reason that an 'unless order' (dated 26 February 2002, in the instant case) is tantamount to an agreement; that in consideration of the time given to the respondent to pay, the respondent will not contest the petition. This court foreshadowed the order that it proposed to make and stood over the proceedings to 15 April 2002. The intention not to contest is further confirmed by the fact that the respondent did not resist the petition on the date of hearing. In any event, the 'unless order' which was made with consent of the respondent has the effect of superseding the affidavit in opposition filed under r. 30 of the Winding-Up Rules 1972. And, the very fact that the respondent sought time to sell off its hotel is an acknowledgement that it is unable to pay its debts unless it is given time to wind up its property holdings. So, pursuant to the 'unless order', I allowed the petitioner's application to wind up the respondent. Further, I appointed one Mr. S.K. Tee as the liquidator of the company and directed that the costs of the petition be paid out of the company's assets.

About 3 1/2 months later, on 22 July 2002 (*vide* encl. 47, prayer 4) the respondent filed an application for stay of the winding-up order pending its application to the Court of Appeal for leave to appeal against my decision. It is important to note that this was an application by the respondent for a stay under s. 253 and not an application by the liquidator or creditor or contributory under s. 243 of the Act, where we have a welter of case authorities. Notably, prayer 4 of encl. 47 was for a common law stay, which this statutory court is empowered to entertain under s. 253 of the Companies Act 1965, and this stay is distinct from the other specie of stay provided under s. 243 of the Act, more commonly described as a statutory or permanent stay, which only the liquidator or creditor or contributory of the company may apply. In considering an application for stay under s. 253 it is illuminating to bear in mind the *dicta* of Plowman J in *Re A & BC Chewing Gum Ltd Topps Chewing Gum Inc v. Coakley and Ors* [1975] 1 All ER 1017 who had this to say:

> As I understand it, the position is this. First of all, as a matter of jurisdiction it is quite clear that I have jurisdiction to grant a stay, because the Companies Act 1948 says so. It says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted. The only exception that I think is known to the Department of Trade is where I myself once went wrong in the Westbourne Galleries case, and not having been alerted to the position, and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding-

> up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of s. 227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.
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> Supposing there is an appeal and the winding-up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered; it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, really no additional harm has been done once the winding-up order has been made by refusing a stay. As I understand it, if the Official Receiver is given an indemnity, say by the Coakley brothers, who are running this business, he will allow it to be carried on, and the Coakley brothers, in this case, could be appointed special managers and carry on the business as they have been doing. If the business is being carried on at a profit, creditors of the business, after the date of the winding-up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding-up. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss – it should not be carried on at a loss obviously.
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> Those, I think, are really the reasons why, in practice, a stay is not granted – a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, if course, *cadit quaestio.*

Though I agree with the practical rationale of the above views, as it accords entirely with realism, and I would salute Plowman J for the rare display of candour in his judgment, yet I must state that it is, in my judgment, beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications incidental to the appeal, including an application for a stay of the winding up order. But, I must however add the caveat, that for the practical reasons advanced by Plowman J, a stay under s. 253 pending appeal should be granted only in very exceptional circumstances, where the winding-up order made is patently wrong in law (for example, the judge being clearly amiss on the law) or on fact, or was made in circumstances which has clearly occasioned a substantial miscarriage of justice.

I am embolden in holding this view, as there may be more than one winding-up petition though only one winding-up order may be made. It may be of interest to know that where two or more petitions are presented for a winding-up order, they take priority according to their dates of advertisement and not according to their dates of presentation. And, another creditor, who chooses to present a second petition does so at his own risk as to costs. Thus, if the first petition is *bona fide*, then the second petition is dismissed with costs (see *Re Building Society Trust Ltd* [1890] 44 Ch D 140; *Re Norton Iron Company* [1877] 47 LJ Ch 9; and *In re European Banking Company, ex p Baylis* [1866] LR2 Eq. 521). A further practical impediment to granting stay, which I have also to bear in mind, is that if a stay pending appeal is allowed bereft of any exceptional circumstances shown and the same directors and managers, who have brought about the subject company's dire financial straits, are *de facto* reinstated to run the company, the winding-up order already made would debar the filing of any further winding-up petitions even for future debts until the appeal is decided, which may be several years hence. The consequence could be that, during the interim period these same directors would run the company with impunity causing serious prejudice to other creditors. Thus, in general, an order to wind up a company will not be stayed pending an appeal. It is beyond question that the respondent in the instant case did not even attempt to show such exceptional circumstances, and I refused the stay. Indeed, the application before me for stay was filed on 22 July 2002, that is, over three months after the provisional liquidator had taken over and had gone full steam to manage the respondent's affairs. Subsequently, I was informed that leave to appeal and stay was granted by the Court of Appeal subject to certain conditions.